



Neutral Citation Number: [2019] EWCA Civ 2048

Case No: B2/2019/1419 and 1422

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CENTRAL LONDON COUNTY COURT
HHJ Hellman
E00CL145

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 November 2019

Before :

LORD JUSTICE BEAN
and
LORD JUSTICE BAKER

Between :

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|--|--------------------------|
| SHAUN EMAMBUX | <u>Appellant</u> |
| - and - | |
| INNISFREE HOUSING ASSOCIATION LIMITED | <u>Respondent</u> |

The appellant appeared in person
The respondent was not present or represented

Hearing date: 31 October 2019

Approved Judgment

LORD JUSTICE BAKER:

1. This is an appeal against a suspended committal order made by HHJ Hellman on 6 September 2018 following findings that the appellant was in contempt of court for breaking an earlier order. In addition, the appellant seeks permission to appeal against a separate order made by the same judge on 10 September 2018 whereby he extended the original injunction. By way of preliminary issue, we have to consider applications for an extension of time for filing the notices of appeal and for permission to rely on fresh evidence.
2. The respondent to the appeal and the application for permission is Innisfree Housing Association Ltd (“the association”), the managing agent of the property in which, at the time when the orders were made, the appellant occupied a flat with his partner, who was the tenant of the flat, and their child.
3. On 16 January 2018, an injunction was granted to the respondent against the appellant under s.4 of the Anti-Social Behaviour Crime and Policing Act 2014. The injunction provided *inter alia*:

“The Defendant, Mr Shan Emambux, is forbidden (whether by himself or by instructing or encouraging or permitting any other person):

...

3. From using, or threatening the use of, violence towards any of the following categories of people:

- a. any person with a right (of whatever description) to reside in or occupy any home located in, or in the locality of the Flat 2 and/or the House

...

4. From engaging in conduct causing, or likely to cause, harassment, alarm or distress towards any person in any of the categories set out in paragraph 3, including but not limited to, using abusive or offensive language”

The appellant was served with a copy of the injunction on 26 January 2018.

4. On 30 January 2018, at a hearing attended by the appellant, District Judge Lightman extended paragraphs 3 and 4 of the order of 16 January and attached a power of arrest to paragraph 3.
5. On 31 March 2018, the appellant was arrested for an alleged breach of paragraph 3 of the injunction. Allegations were made by another resident in the house, Ms Adela Charles, who lived in the flat immediately above the flat occupied by the appellant and his partner, that the appellant had breached paragraphs 3 and 4 of the order by shouting and playing music on a number of occasions. Following his arrest, the appellant was remanded on bail on 1 April 2018 on the condition that he attended a hearing on 3 April 2018. On 3 April, another district judge made various directions

for the trial of the alleged breach which was listed on 26 April 2018. On 26 April 2018, HHJ Freeland QC made an order that proceedings for committal were to proceed under CPR 81.10 and dispensed with the need for the respondent to file an application notice to commence committal proceedings. The earlier directions for the filing of evidence were varied and a committal hearing was listed on 8 June 2018. At that hearing, the application was adjourned again, as it was at the next hearing on 12 July, save that on that occasion an order was made that the appellant surrender his musical instruments to be kept by the association pending the determination of the committal application. The committal hearing finally took place on 5 and 6 September 2018 before HH Judge Hellman.

6. The amended schedule of breaches relied on by the association in support of the committal application contained 11 allegations. In paragraphs 1 and 2 of the schedule, it was alleged that on 24 March 2018, the appellant had breached paragraph 3 of the order of 16 January 2018 by playing loud music between 6pm and 11.45 pm, banging on the ceiling and shouting words. Amongst the words alleged to have been shouted were: “How can this black woman upstairs try bring an argument to me, a dread, I am a dread”. Under paragraph 2 of the schedule, it was alleged that the combination of the appellant banging the ceiling and the words uttered left Ms Charles feeling extremely threatened and frightened by his behaviour. The schedule further alleged in paragraphs 3 to 11 that on nine other occasions between 1 February 2018 and 5 June 2018 the appellant had breached paragraph 4 of the order of 16 January 2018 by playing loud music with his amplified bass guitar and drums, accompanied by occasional singing through a microphone and random shouting.
7. In his judgment on liability, the judge correctly identified the applicable legal principles. He applied the criminal standard of proof as required in committal applications. He recognised that he had to be satisfied that the breach was deliberate, in the sense that the appellant knew about the terms of the injunction and had deliberately carried out acts which constituted a breach of those terms. In this case, another judge at an earlier hearing had made a finding that the appellant had been served with the injunction. He took into account the principle that, as a person of good character, the appellant was less likely to have committed a contempt of court than a person who was not of good character. He reminded himself that each allegation relied on in support of the committal application had to be considered separately.
8. The judge then analysed the written and oral evidence. He carefully considered the credibility of the witnesses, in particular Ms Charles, the appellant, and his wife. With regard to Ms Charles, he acknowledged that it was “fair to say that she bears Mr Emambux no goodwill and on two occasions referred to him as a menace”. He recorded that she had overstated the extent of the harassment, for example when she told the arresting officer that the appellant had “played his music all day and all night” and that he had threatened her “constantly”. He recorded that Ms Charles had accepted that she resented the fact that the appellant does not work, although, as an asylum seeker, he is in fact not permitted to work. At one point, Ms Charles said, “He just wants to harass me, he’s got nothing better to do”. The judge noted that, when assessing her evidence, he had to consider whether those factors indicated that her perception was distorted, or her account exaggerated, or whether she was motivated by malice or ill will towards the appellant. With regard to the evidence given by the appellant and his wife, he noted their denial that the appellant had been playing loud

music on the dates alleged or any other occasion. Although the appellant accepted playing recorded music, he did not accept that it had been loud or played in a way which could reasonably be said to have caused a disturbance to Ms Charles. He accepted that he may have been heard to shout on the occasions alleged, but claimed he was playing with his daughter and did not accept that anything he said or called out was directed at Ms Charles

9. The judge looked for other evidence to corroborate Ms Charles' allegations. He listened to a recording taken from the landing on the stairs in the property. It corroborated the fact that music was being played on the dates in question, and that it could be heard from the landing but provided little assistance as to how loud the music was. He also considered documentary evidence, in the form of a letter written by the association's housing officer and a notice sent to the appellant by the local authority, which indicated that historically there have been a problem with noise emanating from the appellant's flat.
10. Weighing all the evidence, the judge took into account the points summarised above about Ms Charles' evidence, but concluded that he was sure that her account of what happened in relation to the alleged complaints had been true and accurate. He accepted a submission made on behalf of the association that the attitude of the appellant and his wife was that their flat was their "castle" and they could do what they liked there. He concluded that he had no hesitation in preferring Ms Charles' evidence about the alleged breaches of the order.
11. Turning to the amended schedule, the judge concluded that he was satisfied so that he was sure of the facts alleged in paragraphs 1 and 2, and therefore found a breach of paragraph 4 of the injunction, but did not find that a breach of paragraph 3 had occurred on that occasion because he was not satisfied that the words uttered constituted a threat of violence or could reasonably have been construed as such. With regard to the nine other allegations in the schedule, he was satisfied so that he was sure of the facts alleged and that as a result the appellant was in breach of the injunction, although he excluded the allegation of intermittent or random shouting, on the grounds that he was not satisfied to the requisite standard that the words uttered were anything other than the appellant playing with his child.
12. In passing sentence, the judge very properly considered the guidelines to be followed when sentencing for a criminal breach of an anti-social behaviour order. He recognised that he was not dealing with a criminal conviction, but applied the guidelines by analogy. He concluded that the case fell into what he described as the middle range of seriousness, in that it involved a lesser degree of harassment, alarm or distress, where such harm is not intended but was likely to have an adverse effect on the victim. Under the guidelines, the starting point for sentencing in such cases was six weeks' imprisonment. The judge identified an exacerbating factor that the appellant had played loud music over a period of time which had, in Ms Charles' words, made her life a misery. The contempt of court had continued over a sustained period, notwithstanding that the proceedings were in train. On the other hand, the judge recognised as mitigating factors the appellant's previous good character and his indication, through counsel, that he was prepared to comply with the injunction in future. This analysis led the judge to the conclusion that the appropriate sentence was eight weeks' imprisonment.

13. The judge decided, however, that the sentence should be suspended. He concluded that the seriousness of the offending was sufficiently marked by the fact that a sentence of imprisonment was being imposed and, bearing in mind that an immediate custodial sentence should be a last resort, he decided that it was unnecessary to impose an immediate sentence in this case. He also took into account the fact that the appellant and his wife would be continuing to live in the same house as Ms Charles, that they needed to develop a way of living with each other, and that an immediate prison sentence would not help that process.
14. On 10 September 2018, the court made a further order extending the injunction dated 16 January 2018 as amended and the attached power of arrest to 6 September 2019. The judge ordered that the musical instruments surrendered to the association under the order of 12 July 2018 be returned to the appellant. He made an order that the appellant should pay the association's costs of the hearings on 26 April and 5 and 6 September 2018 totalling £8395, but not to be enforced without the court's permission.
15. The appellant did not immediately file a notice of appeal. In the following months, it seems he was involved in other proceedings. The details are not entirely clear but an outline emerged from the appellant's application to adduce additional evidence in support of this appeal, and he provided some further information in the course of the hearing before us. It seems that there have been (1) proceedings brought by the local authority under s.6 of the Anti-Social Behaviour Crime and Policing Act 2014 against the appellant and his partner for an injunction restraining them from assaulting or harassing the authority's officers and employees and two named individuals, (2) possession proceedings brought against the appellant's partner as tenant of the flat, in which a possession order was made some months ago, and (3) care proceedings in respect of the child of the appellant and his partner. Although the existence of these various proceedings was disclosed in the documents which the appellant has filed with this court, it should be noted that in each case he has filed only a few pages from bundles of court documents which will plainly have been much more substantial. In addition, the appellant told us that he had been arrested on a number of other occasions by police attending at the property, and that he was pursuing a complaint against the police.
16. It was not until 10 May 2019, over eight months after the making of the suspended committal order, that the appellant filed two notices of appeal, the first against the committal order and the second against the order of 10 September. He asked for an extension of time for filing the appeal notice, and in support of this application stated: "My appeal is lodged with the court as a result of additional evidence recently becoming available some of which had not been available to me at an earlier date." In his grounds of appeal, he asserted:
 - that he had not received a fair trial
 - that he and his family were suffering disproportionate, unreasonable and unfair consequences of the orders
 - that the judge applied the wrong standard of proof – the balance of probabilities

- that the association and its witnesses had deliberately misled the court
 - that the arresting officer had not produced any evidence of any alleged breach and no one had asked for disclosure
 - that since the orders, he and his family had suffered intimidation and threats of violence.
17. As originally drafted, the notice of appeal against the committal order did not specify any additional evidence on which the appellant wished to rely. On 30 July, however, he was given permission to file an amended notice with an application to adduce fresh evidence said to include documents listed in manuscript on the notice. Subsequently he submitted two CDs containing a number of pages totalling about 100 pages from various documents, plus a number of video recordings apparently taken on a mobile phone. On 13 August 2019, Hamblen LJ directed that a hearing be listed to consider all applications, namely the application for leave to adduce fresh evidence, the application for an extension of time for filing the notices of appeal, and, if granted, the appeal against the committal order and the application for permission to appeal against the order of 10 September, with the appeal to follow if permission granted. The association helpfully provided the court with the bundle used at the hearing before the judge but informed the Civil Appeals Office that it was content with the findings made by the court below and therefore filed no skeleton argument and was not represented at the hearing of the appeal. That hearing was listed before us on 31 October 2019, and at its conclusion we reserved judgment.
18. On the evening before the hearing, the appellant filed a lengthy skeleton argument and a witness statement exhibiting further new documents which had, so far as I am aware, not been filed before. The skeleton argument set out his various complaints in considerable detail. At the hearing, the appellant represented himself, assisted by his wife. He reiterated and expanded on a number of the arguments put forward in the skeleton argument filed the night before. It should be recorded that the appellant conducted the hearing in a helpful and courteous manner.
19. The appellant's principal argument is that he and his family have been the victims of a conspiracy perpetrated by the association in conjunction with the police and the local authority. As I understand his case, he believes that the various proceedings brought against the family were precipitated by a complaint made by his wife to the landlord. He asserts that this complaint has never been properly investigated, nor considered in any of the subsequent court proceedings. His accusations against the alleged conspirators is summarised in the following sentence in his skeleton argument:

“Whilst spreading malicious rumours to undermine our evidence, degrade our character and have our mental capacity questioned, they have together fraudulently achieved to have me and my family evicted, our belongings repossessed, our family in debts, our reputation damaged and most importantly our daughter in care”

The appellant contends that the association has used Ms Charles' allegations as a pretext for its plan to evict him and his family from the property. He asserts that:

“It is not uncommon for retaliation strategies such as the use of ‘vulnerable’ single women as neighbours of good character to put allegations on their neighbours The strategy of using an ASBO against the tenant and escalating the order to committal order so as to serve as a mandatory ground for possession is also not an uncommon strategy.”

It is the appellant’s case that the association’s housing officer and legal representative have adopted just such a strategy in this case.

20. The appellant submits that the injunction made on 16 January 2018 should never have been granted without notice to him. He says that it was not served until 26 January 2018 and that he had no opportunity to seek legal advice and representation, or prepare a proper defence, before he was first arrested for contempt three days later. He puts forward various criticisms of the conduct of the hearing on 30 January 2018. He then asserts that he was given misleading legal advice on several occasions. For these reasons, he was deprived of an opportunity to apply to set aside the injunction, or request a fact-finding hearing to determine whether the basis on which the injunction had been granted was established.
21. The appellant further asserts that judge applied the wrong standard of proof when making the findings on which the committal order was based. He notes that such an order should only be made in case of findings proved “beyond reasonable doubt”, but claims that the judgment clearly states that the judge is not satisfied beyond reasonable doubt as to the appellant’s motivation when causing any harassment. The appellant asserts that no actual tangible findings have been made and that the court’s decisions have been made without regard to his evidence and on the basis of opinions and character judgment rather than facts.
22. It is the appellant’s case that the judge’s assessment of Ms Charles’ evidence was deficient. He claims that the judge failed to consider the changes in her version of events, her failure to answer some of his questions, and her evasion when answering others. He asserts that Ms Charles has subsequently sent members of her family to harass and threaten his family. He says that no other neighbour has complained nor witnessed any noise from his property, and that he had produced a letter from other neighbours confirming that they had not been disturbed. The appellant makes a number of further complaints about the behaviour of the association’s housing officer, and the police officer sent to arrest him. He says that he has not been allowed any opportunity to challenge their conduct in any court proceedings.
23. The appellant submits that, although the judge took into account some mitigating factors when passing sentence, he ignored others, such as the fact that he is a father and husband. He contends that the judge did not properly consider the alternatives to a custodial sentence and that, given his previous good character, he should not have received any custodial sentence at all.
24. As mentioned above, the appellant seeks to rely on fresh evidence in support of his appeal. Some of the documents filed are extracts from papers relating to the subsequent proceedings. The appellant asserts that those proceedings demonstrate that Ms Charles was involved with social services in the events which led to the care proceedings in respect of his daughter and that the subsequent proceedings brought

against the appellant and his wife were also based on her allegations. He states that none of the allegations made by Ms Charles about his lifestyle or conduct are true.

25. I turn to consider the preliminary issues. It would normally be appropriate to consider first the application for an extension of time for filing the appeal notices, but, in this case, the appellant seeks to rely on the fresh evidence he wishes to adduce not only in support of the appeal but also to explain the delay in filing the notices. It is therefore appropriate to consider the fresh evidence issue first.
26. The material on which the appellant wishes to rely has been produced in two tranches, the first on two CDs filed with the Civil Appeals Office some weeks ago and the second exhibited to a statement filed shortly before the hearing. The material on the CDs includes, first, some video recordings falling into three categories: (1) a recording apparently taken on the appellant's wife mobile phone of the appellant's arrest for breach of the injunction; (2) a recording taken some time later of an incident when, it is said, members of Ms Charles' family caused an altercation outside the flat then occupied by the appellant and his wife, as a result of which the police were called again; and (3) a number of short recordings taken on a staircase, presumably in the house where the appellant's flat is located. The recordings of his arrest and those taken on the staircase were plainly available to the appellant for some months prior to the committal hearing and no satisfactory explanation has been put before this court as to why, if considered relevant, they were not adduced in evidence before the judge. In my judgment, the other recording is not relevant to the narrow issues arising on this appeal.
27. As for the documents contained on the two CDs, they consist of various extracts from a number of larger documents, including redacted police records relating to a number of incidents at the property, isolated extracts from social services records of complaints about incidents involving the appellant's flat, isolated pages from court documents relating to the subsequent harassment and possession proceedings, and a single page from a position statement filed in the care proceedings. As I understand the appellant's argument, he contends that these documents, taken as a whole, substantiate his case that he and his family have been the victims of a conspiracy. For my part, I would not be prepared to admit this evidence on appeal. Even allowing for the disadvantages which a litigant in person is under when conducting court proceedings, the documents have been presented in a way which I find impossible to accept. Isolated pages from documents cannot possibly be regarded as credible evidence. Although the details of the subsequent court proceedings are unclear, it seems that the appellant and his wife were evicted from the property as a result of the possession proceedings and that their daughter has been taken into care in the course of the care proceedings. It must follow, therefore, that in both of those proceedings the court made findings against the appellant and/or his wife on the basis of all the evidence adduced. In those circumstances, it is plainly wrong for this court to accept as evidence isolated pages from the documents filed in those proceedings. In any event, having read the documents, I can see no prospect of the documents, if admitted, having any influence on the outcome of this appeal.
28. The additional documents appended to the witness statement filed by the appellant on the day before the hearing include documents concerning the appellant's complaint against the police, documents relating to subsequent incidents at the appellant's property, further documents in the possession proceedings brought against the

appellant and his wife, and a letter about the appellant and his wife from a consultant psychiatrist. I can see no reason why these documents were not included in the material filed with the court some weeks ago. So far as I am aware, the respondent was not given notice of the fact that the appellant wished to rely on this material at the appeal hearing. Furthermore, none of this material is relevant to the narrow issues before us on this appeal.

29. In my judgment, none of the additional documents which the appellant wishes to adduce in support of his appeal satisfies the test in *Ladd v Marshall* [1954] EWCA Civ 1.
30. The second preliminary question is whether to extend time for the filing of the appeal notices. In answer to direct questions from this court at the start of the hearing, the appellant said that he had been misled by his legal representatives and did not know if he could appeal against the order. He was also having to deal with the other cases. In my judgment, the appellant has given no good reason for the delay in filing the notices. He did not file them until over eight months after the orders were made. By that stage, two thirds of the period for which the committal order was suspended and the injunction extended had passed. By the time of the hearing before us, the period of the suspended committal order and the extended injunction order had expired. For those reasons, I see no grounds for extending time in this case.
31. In those circumstances, it is strictly unnecessary to consider the merits of the appeal, or the application for permission to appeal against the extension of the injunction. But having regard to the arguments that have been put before us, I think it only fair that I should set out my views on the merits.
32. First, the appellant's complaints about the circumstances in which the original injunction was made do not assist him on an appeal against a committal order made for breach of the injunction. Whatever arguments the appellant may have about the making of the injunction in January 2018, he was bound by its terms unless and until it was discharged.
33. Secondly, the appellant is mistaken in asserting that the judge applied the wrong standard of proof when considering the allegations of contempt of court. It is clear from the judgment that the judge correctly applied the criminal standard of proof to the allegations. It is correct that he did not find that a breach of paragraph 3 of the injunction had occurred on 24 March 2018 because he was not satisfied to the criminal standard that the words uttered constituted a threat of violence or could reasonably have been construed as such. He also excluded the allegation of intermittent or random shouting, on the grounds that he was not satisfied to the requisite standard that the words uttered were anything other than the appellant playing with his child. He was, however, manifestly satisfied to the criminal standard that the appellant had committed the acts alleged in paragraphs 1 and 3 to 12 of the schedule and that these acts amounted to breaches of paragraph 4 of the injunction.
34. Thirdly, I find no substance in the appellant's complaint about the judge's treatment of the evidence. The appellant's principal argument is that Ms Charles was an untruthful and inconsistent witness and that the judge was wrong to rely on her evidence. It is, however, well established that the assessment of evidence, and the apportionment of weight to be attached to each piece of evidence, is a matter for the

judge at first instance. An appeal court will not interfere with findings of fact by trial judges unless there are compelling reasons for doing so. In this case, the judge analysed Ms Charles' evidence with considerable care. He noted some points at which her evidence was overstated. He took into account certain comments that she made showing that she had a low opinion of the appellant. After taking all such points into account, however, and considering all the evidence, he concluded that her allegations were true. In my judgment, having carried out such a very careful analysis of her evidence, in the context of all the other evidence, including that given by the appellant and his wife, the judge was entitled to reach this conclusion.

35. Fourthly, the appellant's criticisms of the judge's approach to the sentencing for his contempt are misconceived. It is manifestly clear that he took into account a range of matters, including aggravating and mitigating factors, before reaching his decision on sentence. That decision was well balanced and fully reasoned. The appellant has raised a number of other complaints about the way in which the proceedings were conducted. For my part, I can see no grounds for finding that the process was in any way unfair to the appellant.
36. The appellant is convinced that he and his family have been the victims of a conspiracy, involving neighbours, employees of the housing association, social workers and the police, which led to further proceedings resulting in their eviction from their home and the removal of their daughter into care. Those proceedings are not before us and it would be wrong to make any comment about them. It is sufficient to say that there is nothing in the material which the appellant has put before us in support of his assertion about a conspiracy which gives rise to any ground of appeal against the orders with which we are concerned.
37. In my judgment, Judge Hellman carried out a very careful analysis of the evidence. I see no grounds on which his assessment could fairly be challenged in this court. His findings were measured and well-reasoned. His approach to the sentence following his findings was equally careful and balanced. It seems to me that the judge conducted this difficult exercise in an exemplary fashion.
38. For these reasons, I would dismiss the appeal against the judge's findings and the suspended committal order, and also against the application for permission to appeal against the extension of the injunction.

LORD JUSTICE BEAN

39. I agree.